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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd

HIGH COURT (SINGAPORE) — SUIT NO 1326 OF 1989
CHAN SEK KEONG J
10 MAY 1990

Banking — Counterfeit cheques — Bank paid out on cheques and debited customers' account — Whether customer entitled to summary judgment against bank — Suspicious circumstances surrounding cheques

Civil Procedure — Summary judgment — Whether customer entitled to such where bank debited account on counterfeit cheques — Rules of Supreme Court 1970, O 14 r 3(1)

The plaintiffs were customers of the defendants who were bankers. Several cheques apparently drawn on the plaintiffs' account ('the cheques') were paid out by the defendants who then proceeded to debit the plaintiffs' account. The plaintiffs started the present action claiming that the defendants had wrongly paid out on the cheques. Their application for summary judgment was dismissed and they appealed. The cheques were duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendants. The signatures on the cheques were declared by expert evidence to have been traced from genuine signatures.

Held, dismissing the plaintiffs' appeal:

(1) The circumstances disclosed called for further investigation. The circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiffs constitute 'some other reason' for a trial in terms of O 14 r 3(1).

(2) Whatever the outcome of the main action, greater injustice would be done to the defendants if they were not given leave to defend. If judgment is entered against them, there is a real likelihood of the plaintiffs terminating their overdraft facility with the defendants and withdrawing their fixed deposit so that even if the defendants were able to prove fraud on the part of the plaintiffs at some future time, they might not be able to recover their loss. Giving the defendants leave to defend would simply mean that the plaintiffs' funds would remain on fixed deposit and continue to accrue interest until the action is disposed of.

Cases referred to

1 *Miles* v *Bull* [1968] 3 WLR 1090 (folld)
2 *The Lady Tennant* v *Associated Newspapers Group Ltd* [1979] FSR 298 (refd)
3 *Belmont Finance Corp* v *Williams Furniture* [1979] Ch 250 (refd)
4 *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 14 r 3(1)

Lee Mun Hooi for the plaintiffs/appellants.
KS Chung for the defendants/respondents.

Cur Adv Vult

Chan Sek Keong J: This action arises out of a bold and unusual scheme to defraud either the plaintiffs as customers of the defendants or the defendants as the bankers of the plaintiffs by the use of apparently forged cheques (which I shall hereafter refer to as 'disputed cheques' as the defendants are not sure whether they are forgeries under the law). Not only were the signatures of the bank signatories of the plaintiffs written on the disputed cheques alleged to have been forged, the cheques themselves were duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendants!

The defendants have debited the current account of one of their customers, the plaintiffs in this action, in the total sum of $304,576.70 paid out on the disputed cheques. The defendants are, as yet, unable to deny the alleged forgery of the disputed cheques, how it was done and who did it. Police investigation has up to date resulted in the conviction of two persons (who pleaded guilty) for cheating under s 420 of the Penal Code (Cap 224, 1985 Ed). They were responsible for the cashing of the disputed cheques. But, no one has yet been charged for forgery of the disputed cheques.

In this action, the plaintiffs have claimed that the defendants have wrongfully paid out and debited their current account for the total amount of the disputed cheques. They applied for summary judgment but the assistant registrar dismissed the application. The plaintiffs have now appealed against the said decision.

The plaintiffs had a current account with the defendants since November 1974. In 1988, they had an overdraft facility of up to $300,000 from the defendants, secured by a cash deposit of $300,000. On 4 January 1988, the plaintiffs' directors, viz Chua Thuan Khoon (CTK), Kuik Ah Han (KAH) and Ng See Toy (NST) passed a resolution that thereafter the cheques drawn on the ac-

count must be signed by at least two of the said directors, as, it would appear, two directors had resigned and CTK had come in as a new director. CTK was described as the chairman. Except for their role as cheque signatories, both CTK and KAH are said to be 'sleeping' directors at all material times.

On 4 May 1988, the plaintiffs applied to the defendants for and obtained five cheque books. The application form was signed by KAH and NST. The receipt for the cheque books was signed by NST.

The statement of facts admitted by the two convicted persons at their trials disclosed the following 'facts' as accepted by the police: that on 12 March 1989, NST left for China on business. Instead of delegating his duties to his fellow directors, he appointed a distant relative, viz Ng Teck Kwang (NTK), the son of a former director, to look after the affairs of the plaintiffs. On 4 April 1989, NTK received the plaintiffs' monthly statement from the bank and found that there were several unusual withdrawals reflected in the said statement. He then called NST in China and the latter confirmed that he never made those withdrawals. On the following day, NTK and KAH went to the bank to verify the discrepancies and discovered that a total of 13 cheques amounting to $304,576.40 had been cleared by the bank where the signatures were forged on printed cheque forms not supplied by the defendants. All the 13 *genuine unsigned cheques bearing the corresponding printed numbers thereon were still in the possession of the plaintiffs.*

Coincidentally, at the time of the said inspection, one of the convicted persons came into the bank to cash another cheque issued from the duplicated cheque book and was detained by the security guard. The story of the two convicted persons was that they had been approached by persons (described therein as Mr A and Mr B) to cash the alleged forged cheques for reward.

NTK has also been arrested by the police in connection with the fraud and released on bail pending further investigation. Counsel for the defendants says that police investigation is still continuing.

The plaintiffs have produced in evidence a report of the handwriting expert from the Department of Scientific Services. The report is dated 23 August 1989 and referred to the examination on 7 June 1989 of 16 cheques, Nos 748199 to 748206, 748208 to 748211, 748213 and 748216 to 748218, all bearing the alleged signatures of KAH and NST. The expert, after observing that all the signatures on the said cheques were not fluent but the strokes thereof were identical to the specimen signatures, opined that they could be copied forgeries, ie traced from genuine signatures. The expert found that the rubber chop used to chop the name of the plaintiffs on the disputed cheques was not the same as the genuine chop. She further found that the paper and the print of the disputed cheques were not the same as the paper and print on the cheques supplied by the bank to the defendants.

It is clear from such evidence as there was before the court that the person or persons responsible for the fraud had knowledge of the details of the banking arrangements of the plaintiffs, including the bank, branch and account number of the plaintiffs' current account, the requirements as to the number of and the identities of the cheque signatories and their signatures and also the serial numbers of the unused cheques in the cheque books then in the possession of the plaintiffs. On the basis of the expert's report, the fraudster/s also had access to documents containing the genuine signatures of KAH and NST which were then traced on the duplicated cheques. More important than anything else is the inference that, in using the duplicated cheques with the same numbers as the genuine cheques, the fraudster/s must or most probably have done so with the fore-knowledge or the expectation that the genuine cheques hearing the same numbers would not be used at the same time, as otherwise the whole fraudulent scheme would be blown.

Naturally, in these circumstances, the defendants suspect that some person or persons within the plaintiffs' organization had something to do with the fraud, either in the copying (if such be the case) of the signatures or in providing the means for such copying. Since, the first of the disputed cheques was presented and cashed nine days after NST left for China and from then onwards a series of similarly signed 12 cheques were presented for payment, NTK is regarded by the defendants as a prime suspect. Counsel for the defendants has also suggested that NST, the managing director, has also failed to file an affidavit to explain how the fraud could have occurred in the manner in which it has occurred, and that this omission gives rise to further suspicion as to his own conduct. In any case, it is suggested that the defendants should be entitled to investigate his silence. In short, the defendants are presently unable to say who did what but say that they should be given leave to defend in order to find out who did what.

Counsel for the defendants referred to the decision of Megarry J in *Miles* v *Bull*[1] in support of his contention that the defendants should be given leave to defend in view of the extraordinarily suspicious circumstances surrounding the fraud. In that case, the defendant and her husband separated, and the husband thereafter sold the matrimonial home, in which the defendant was still living, to the plaintiff at the price of £10,000, of which £1,000 was payable in five years free of interest, but otherwise completion to take place on the date of contract. The plaintiff then commenced an action for possession and applied for summary judgment. The master gave unconditional leave to defend. On appeal, Megarry J held that the only defence

available to the defendant (which she put forward) was that the sale was a sham, ie entered into for no purpose other than to evict the defendant, but that on the evidence there was no arguable case that the sale in question was a sham. His Lordship then turned to question whether leave should be given on some other ground and said:

> In these circumstances, I think that it is necessary to examine the precise wording of O 14. Under the former O 14 r 1, a defendant could obtain leave to defend if he satisfied the judge that he had a good defence to the action on the merits, or disclose 'such facts as may be deemed sufficient to entitle him to defend the action generally'. I do not see how that can be said to be the case here. The language of O 14 has, however, been changed, and it is the new language that I must apply.
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> Under rr 3 and 4 of the present O 14, the defendant can contain leave to defend if (and I read from r 3(1)) the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or, that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine O 14 to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimler Company Ltd* v *Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, referred to in the notes to O 14 in the Supreme Court Practice 1967, p 123, if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under O 14 r 1'. The question is thus whether this is such a case.
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> I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think that it would be just if the plaintiff were able to enforce the rights which he claims without being put to strict proof what they do enable him to evict the defendant. I was told that, in granting leave to defend, Master Jacob said that the case was 'too near the bone for O 14'. That, if I may say so, seems to me to summarize admirably what I have tried to express in greater detail. Order 14 is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

I also bear in mind what Bramwell LJ said in *Harrison* v *Bottenheim* (1878) 26 WR 362. Even on the old wording of O 14:

> 'though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O 14, and should not be pursued without his being allowed to defend.'
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> Bramwell LJ also referred to the remarkable fact that that action was on a bill of exchange three years old, and so the case was one of a stale claim, a circumstance perhaps matched by the remarkable promptitude of completion in the case before me.

In *The Lady Tennant* v *Associated Newspapers Group Ltd*,[2] the defendants relied on *Miles* v *Bull*,[1] but the Vice-Chancellor held that on the facts before him, there was no other reason for a trial. In that case, the defendants had bought four photographs, two of HRH Princess Margaret and two of her friend, L, from one W who gave a warranty in writing that he had the right to sell the copyright in the said photographs. The photographs had been taken by the plaintiff and were taken by her son without her permission and then sold by W. The plaintiff commenced an action for various reliefs and applied for summary judgment. No issue arose as to the ownership of the copyright in the photographs. The defendants filed a defence that they had reason to believe that the reproduction of the photographs were not infringing copies of the plaintiff's copyright works. The learned judge found that the warranty of W did not support any defence put forward by the defendants. Counsel for the defendants submitted that leave to defend should be given 'for some other reason' as in *Miles* v *Bull*.[1] The Vice-Chancellor's judgment on this submission is as follows:

> I cannot see that there is any force in any of this. As I have indicated, no defence of licence has been put forward. The only claim is one of assignment, and the only document put forward to support assignment relates to only two photographs out of the four. If the defendants choose to deal with [W] without any investigation or inquiry (and they have not suggested that they have made any), and they then have difficulty in tracing him, that is their misfortune, and no ground for denying or delaying the plaintiff in her rights. Over four months have passed since the writ was issued, and yet there is no evidence of any attempt by the defendants even to investigate the matters of which they now complain. On their own evidence, they spoke to [W] after the plaintiff's solicitors had raised the matter with them, and so were able to make such inquiries of him as they then wished. A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism. *Miles* v *Bull* [1968] 3 All ER 632 was an entirely different case. In it, there were grounds for suspicion about the plaintiff's claim that constituted sufficient reason for there to be a trial of the action. Here, there is no suspicion whatever about the plaintiff's case; the only relevance in this case lies in the surprising lack of it on the defendants' part in dealing with [W].

So much for the authorities. Counsel for the plaintiffs submitted that the plaintiffs were entitled to judgment as the defendants have not been able to point to a specific defence under the law. He pointed out that but for the wrongful debits the plaintiffs' account were in credit to the extent of $80,000 and that about a year had elapsed since the fraud and the defendants had not been able to come up with any allegations against specific persons. Accordingly, he contended that this case was nearer to that of *The Lady Tennant*[2] than *Miles* v *Bull*[1] and that the defendants' case is all surmise and Micawberism. In my view, the defendants' position is better than that of the defendants in *The Lady Tennant*[2] in that in the latter the newspapers had already made inquiries with W and were still not able to substantiate the defence they had put up. In the present case, not only were the facts concerning the way in which the plaintiffs conducted their banking account within their own knowledge, the defendants have yet to test whatever explanation the plaintiffs might come up with.

Counsel also submitted even if the defendants were able to prove that the directors and/or any of them and/or NTK were responsible for the fraud, they would still have no defence as the plaintiffs would merely be the victim of the fraud. Counsel referred to the authority of *Belmont Finance Corp* v *Williams Furniture*.[3] The facts, as presently known, are that the proceeds of some of the disputed cheques have been recovered from the accounts of the two convicted persons, but there is no evidence that the rest of the proceeds of the fraud has been paid to any of the directors or the controlling or someone else with their knowledge and consent. To this extent, the plaintiffs are unable to say that the defendants are not the victim of the fraud.

In answer to this submission, counsel for the defendants has contended that the defendants are not liable if they can prove that the forgeries were made by or pursuant to a scheme devised by the controlling mind of the company (as to which concept he cited Lord Reid's judgment in *Tesco Supermarkets Ltd* v *Nattrass*[4] at p170E-G and p171F-G). Counsel suggested that the controlling mind could be NST or his delegate NTK.

I do not think that on the facts before me, I should consider these submissions at this stage of the proceedings. It may well be that given time, the plaintiffs may be able to establish that the defendants were a party to rather than a victim of the fraud. The question before me is whether the circumstances are such that the defendants ought, in the interest of justice, be given time and with it the opportunity to investigate further the fraud by whatever means that are available to them, including a trial, to determine for themselves whether they are liable as bankers.

In my view, the circumstances as disclosed call for further investigation, notwithstanding that the police has been investigating the matter for some time. The nature of a police investigation is quite different from that of an investigation by a party for the purpose of defending himself in a civil claim. The difference lies in the standard of proof and also the object of the investigation. Moreover, it is a very sophisticated fraud and therefore careful planning must have gone into it. I am not surprised that the defendants were unable to detect it. The plaintiffs have not given any explanation as to how it was possible that their current account with the defendants could have been operated by copied signatures on duplicated cheques which fact, in itself, would suggest fraud by an insider. They have also not explained why NST 'delegated' the running of the plaintiffs' affairs when he went to China rather than to one of the other directors. No doubt, the defendants are unable to point to a specific defence, but, in theory, the following scenarios are possible: (1) that, assuming that the defendants accept the conclusions of the handwriting expert, the cheques were copied by the signatories themselves, ie they are 'self-forgeries'; (2) that the signatures were copied with the knowledge or consent of both the signatories or one of them; (3) that the signatures were copied by or with the knowledge or consent of the controlling mind of the plaintiffs, whoever he may be at the material time.

In my view, the circumstances in which and the sheer audacity with which it was carried out and the absence of any explanation by any of the directors or NKT constitutes 'some other reason' for a trial in terms of O 14 r 3(1). I agree that O 14 is for the plain and obvious and not for the devious and crafty, and respectfully follow *Miles* v *Bull*.[1] Whatever the outcome of this action, greater injustice would be done to the defendants if they were not given leave to defend. If judgment is entered against them, there is a real likelihood of the plaintiffs terminating the overdraft facility and withdrawing their fixed deposit of $300,000 so that even if the defendants were able to prove fraud on the part of the plaintiffs at some future time, they may not be able to recover their loss. On the other hand, giving the defendants leave to defend would simply mean that the plaintiffs' funds will remain on fixed deposit and continue to accrue interest until the action is disposed of.

For the above reasons, I dismiss the appeal. But, in view of the circumstances of the case, the costs of the appeal will be costs in the cause.

Appeal dismissed.

Solicitors: *Lee Bon Leong & Co; Chung & Co.*

Reported by *Terence Tan Bian Chye*